

NO. 45174-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CHRISTOPHER BOYD,

Respondent,

v.

STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; and WESTERN STATE HOSPITAL,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

At the time relevant to this lawsuit, Christopher Boyd (Plaintiff/Respondent) was a Registered Nurse (RN) 2 at Western State Hospital (Western State). On December 26, 2009, several members of the nursing staff reported to a supervisor, Patricia Maddox, RN3, that Boyd had failed to respond to calls to assess a patient. This was significant misconduct affecting patient care and as such required an investigation as part of a potential disciplinary process. The investigation concluded that Boyd had engaged in misconduct. When given the opportunity to respond, Boyd claimed, for the first time, that supervisor Patricia Maddox, RN3, had sexually harassed him and retaliated against him because he declined her advances. Boyd specifically claimed that the investigation into his misconduct was biased because of Maddox's retaliation. As a result of Boyd's claim of bias, Western State redid the investigation, without any involvement from Maddox, and again concluded that Boyd had engaged in misconduct. Western State suspended Boyd for two weeks without pay.

Western State also undertook a separate investigation, this time of allegations that Boyd made statements that were perceived as threatening by Paula Cook-Gomez, who was the lead of the first patient neglect investigation. Specifically, the day she was assigned to

investigate, she overheard Boyd making comments about “the best way to shoot somebody without getting caught” was with an AK-47, while describing the area in which both he and Cook-Gomez worked and parked. Boyd explained that the best way to get rid of a woman’s body was by burning it in the trunk of a car. He also described the damage a large cake knife stored in his locker could do to somebody. Western State concluded that these statements violated workplace policies and issued Boyd a letter of reprimand.

The trial court correctly dismissed Boyd’s claims of sexual harassment prior to trial, but erroneously ruled that Western State could be liable for retaliation and allowed that claim to go to the jury. The trial on the retaliation claim suffered from four fundamental errors. First, Boyd was allowed to complain of alleged “adverse employment actions” that were not a cognizable basis for a claim of employment retaliation because they did not significantly alter his job responsibilities. Second, the trial court erroneously denied Western State’s CR 50 motion based upon the absence of any evidence that the actual decision makers who made the decision to discipline Boyd, as well as other decisions, had any retaliatory animus. Third, the trial court failed to give Western State’s proposed special verdict form, which specifically set forth each potential adverse employment action upon which liability could be based. As a

result, it is now impossible to discern if liability was premised on a legitimate business employment decision. Finally, the trial court erroneously instructed the jury on a “cat’s paw” theory of liability, which allowed Western State to be liable for retaliation based upon Maddox’s role in the investigation in spite of a complete absence of any evidence that Maddox misstated any fact or misrepresented the statement of any witnesses when she reported those statements to her chain of command as required.

The jury verdict in favor of Boyd should be reversed because (1) it was based upon non-actionable employment actions, (2) it was unsupported by substantial evidence, and (3) it was the result of an erroneous instruction that allowed the jury to impose liability on Western State in the absence of any evidence that Boyd’s discipline was the result of any improper action taken by Patricia Maddox.

II. ASSIGNMENTS OF ERROR

A. Grounds For Dismissal

1. The trial court erred in entering judgment in favor of Boyd.
2. The trial court erred in denying Western State’s CR 50 motion to limit Boyd’s retaliation claim to only cognizable adverse employment actions.

3. The trial court erred in denying Western State's CR 50 motion based upon a lack of any evidence of retaliatory animus on the part of the actual decision makers who made the decision to discipline Boyd.

4. The trial court erred in failing to give Western State's proposed special verdict form which set forth the specific employment actions upon which liability could be based.

5. The trial court erred in giving the so-called "cat's paw" jury instruction. (Jury Instruction No. 11).

B. Issues Pertaining to Assignments of Error

1. Did the trial court err in allowing the jury to consider actions that could not be "adverse employment actions" as a matter of law? (Assignment of Error Nos. 1, 2, 5).

2. Was retaliation a substantial motivating factor in Western State Hospital's decision to discipline Boyd and take other employment action? (Assignment of Error Nos. 1, 3).

3. Does the "cat's paw" theory of liability apply where the evidence of the underlying misconduct is undisputed, there is no evidence of fabrication, and the conduct that did occur is sufficient to warrant discipline or other employment action? (Assignment of Error Nos. 1, 4, 5).

III. STATEMENT OF FACTS

A. **Boyd's Coworkers Alleged That Boyd Engaged in Patient Neglect, And Western State Found The Allegations Warranted Investigation.**

On December 26, 2009, in the early morning hours, Boyd was working as the RN2 in the Habilitative Mental Health Unit (HMH), which consists of two sister wards, Wards C-1 and C-4.¹ Boyd was assigned to Ward C-4. Each ward has an RN3 that supervises the nursing staff on that ward. On December 26, 2009, neither RN3 was scheduled, so Boyd, as the only RN scheduled, served as the charge nurse for both HMH wards.²

At the start of the next shift, on the night of December 26, 2009, Patricia Maddox, RN3, arrived at work and immediately learned that her staff on C-1 was “buzzing” and “quite upset.” Maddox’s staff reported to her that on the previous shift, Rod Bagsic, a Licensed Practical Nurse (LPN) on C-1, had called Boyd, who was on C-4, and requested that he assess a patient they were having trouble with. Bagsic reported that Boyd “didn’t come and didn’t come” until they had to call the RN4 who was Boyd’s supervisor. RP 432:24-433:17.

Maddox reported the allegations to her direct supervisor, Annette Southwick, RN4. RP 434:22-435:23. Southwick, the Psychiatric Nurse

¹ Boyd was assigned to the graveyard shift, from 11 p.m. until 6 a.m.

² As “sister wards,” the wards regularly shared a registered nurse as a charge nurse when one of the two RN3s had the day off or was otherwise not scheduled.

Executive, and the Human Resource Department each required that the RN3s report allegations of misconduct of this severity. *See* RP 654:2-10, 1352:19-1353:9; RP 6/24/13 9:14-11:14. Southwick discussed the matter with her direct supervisor, Joanne Blacksmith, Psychiatric Nurse Executive, who in turn decided that the matter should be brought before the Management Resource Team (MRT). RP 1354:9-12; RP 6/24/13 9:14-11:14.³ Accordingly, within the next few weeks, Southwick directed Maddox to gather statements of those present on December 26, 2009, in order to present them to the MRT for a determination as to whether a formal investigation was required as part of the disciplinary process. RP 436:3-5, 1354:19-1355:20.

The statements gathered stated, generally, that: at roughly 1 a.m., Rod Bagsic, an LPN on Ward C-1, called Boyd, the RN supervising both wards, and requested that he assess Patient J who was requesting sleep medication (Exhibits (Exs.) 75-76; 79-81); after roughly 30 to 60 minutes, because Boyd still had not arrived, Bagsic made a second call to Boyd and upon receiving that call, Boyd impersonated a subordinate coworker and then handed the phone to the coworker with the instruction to say that

³ The Management Resource Team (MRT) is made up of the Psychiatric Nurse Executive, who oversees the entire nursing staff, RN4 Southwick, as it was her subordinates involved, and members of the Human Resource Department and Incident Management Office. RP 654:17-24. The purpose of the MRT is to give clear direction once an allegation of misconduct arises so that the matter is dealt within a proper and fair manner in determining if just cause for discipline is present. RP 1353:16-21.

Boyd was not available because he was in the bathroom, while Boyd sat giggling to himself (Exs. 76-79; 81); Bagsic then called the on-duty RN4, Kara Hammelsbach, to direct Boyd to assess the patient (Exs. 75-77; 81). Maddox did not interview or engage with the staff about the allegations, but rather just requested written statements about the events of December 26, 2009. RP 436:22-437:4, 458:20-459:1.

According to Southwick, RN4, Boyd's behavior was "egregious" because of the delay in response, the failure to assess the patient, and the impersonation of another staff member. Thus, the MRT decided to initiate a formal investigation. RP 1355:21-1356:5. Maddox played no role after gathering the written statements, and was not one of the decision makers in the decision to investigate or discipline Boyd. RP 460:2-462:1.

B. Western State's Investigation Showed Boyd Had Engaged In Patient Neglect

On January 14, 2010, Annette Southwick, RN4, assigned Boyd's direct supervisor Paula Cook-Gomez, RN3, to investigate. RP 1356:6-18. It is the common practice that front-line supervisors gather information and conduct interviews in what is essentially a performance evaluation, as part of the investigatory process. RP 1356:9-18, RP 6/24/13 15:15-16:21.

Cook-Gomez, with the help of Georgia Armstrong, investigator from the Incident Management Office, formulated the questions upon which the interviews were based. During this phase of the investigation,

Cook-Gomez maintained regular contact with her supervisors and the investigator. RP 1356:23-1357:6. Cook-Gomez interviewed eight staff members of Wards C-1 and C-4 regarding Boyd's conduct on December 26, 2009. *See generally* RP 6/19/13 36-51. After the interview, Cook-Gomez typed their answers and then once again met with the particular staff member to afford them the opportunity to edit their statement before signing. RP 6/19/13 52:4-7; Exs. 27, 84-91. The statements gathered were consistent if not identical to what was originally reported.

On January 27, 2010, Cook-Gomez interviewed Boyd. Cook-Gomez was accompanied by Maddox, Southwick, and Boyd's union representative. RP 6/19/13 52:4-7. As with the other staff members, Boyd was provided an opportunity to provide written edits to his statement and did so. RP 6/19/13 50:16-51:12; Ex. 91. At this time, Boyd did not allege sexual harassment or assert the investigation was somehow retaliatory.

Cook-Gomez also reviewed Patient J's medical record pertinent to December 26, 2009, and noticed a number of inconsistencies with Boyd's account of that night: (1) the doctor Boyd stated was on call that night and whom he talked to, was not actually working that night; (2) Boyd stated that Patient J had an order for medication that she did not have; and (3)

Boyd noted on Patient J's medical chart that he gave a certain medication to Patient J, though he stated in his interview that he was not sure if that medication was ever given. RP 6/19/13 63:17-19, 63:23-64:2, 64:3-16.

Cook-Gomez completed the report on May 12, 2010, and presented it to the MRT. RP 6/19/13 69:7-16, 69:23-70:1. The report summarized the findings from her investigation, and attached as appendices the witness statements. Ex. 108.

Generally, it is the role of the RN4 and MRT to determine the facts, while the RN3 gathers and reports the facts. RP 1392:16-22. The MRT reviews the report and attachments and decides whether discipline is appropriate. RP 1363:10-22; RP 6/24/13 20:14-20. The process to determine the appropriate level of discipline involves discussion between upper management and the Human Resource Department, along with review by an assistant attorney general, and ultimately the Chief Executive Officer, who signs the Notice of Intent to Discipline. RP 1729:18-1730:16.

Here, the MRT determined, among other things, that Boyd (1) knowingly evaded two requests for assistance to meet a patient's needs; (2) willfully impersonated another staff member and requested that a subordinate staff member impersonate him; (3) interfered with a subordinate's ability to perform his duties in meeting the needs of a

patient; (4) used profane language; and (5) provided false information surrounding a medication order obtained for a patient. Ex. 116. Accordingly, on October 16, 2010, Western State delivered to Boyd a Notice of Intent to Discipline, which is the formal notification required to provide an employee with an opportunity to respond. Ex. 116.

The range of potential disciplinary action included dismissal because Boyd failed to perform the duties of a nurse. RP 6/24/13 20:21-21:8. According to Blacksmith and Southwick, Boyd failed to assess the patient, did not show leadership and the ability to get along with staff, took too long in responding to the calls, impersonated a coworker, and was dishonest about his tardiness. RP 6/24/13 21:14-25:8. In short, patient care was compromised, and because Western State is responsible for meeting its patient needs, those needs cannot be taken lightly. RP 1369:1-15, 1369:21-1370:9. Boyd agrees that if the factual assertions set forth in the Notice of Intent are accurate, then discipline including dismissal would be appropriate. RP 1080:10-18.

On December 1, 2010, Boyd was provided an opportunity to again explain his conduct and why discipline was not appropriate. Present at this meeting was Western State Chief Executive Officer Jess Jamieson, and HR Manager Peggy Nelson. Boyd was accompanied by his union representative and his lawyer. During this meeting, Boyd claimed that he

had been sexually harassed by RN3 Patricia Maddox, he told her to stop in April 2009, and because of this, the investigations into his misconduct were biased and retaliatory. RP 667:1-8. This was the first time he notified management of his claims of sexual harassment.

Because Boyd claimed the investigations were biased, Western State asked an investigator from the Incident Management Office to re-do the investigation, and asked the Washington State Patrol to investigate the claims of sexual harassment.⁴ RP 667:4-25. David Rivera, investigator, was assigned to reinvestigate the allegations arising on December 26, 2009. Rivera interviewed 12 witnesses. *See generally* RP 1435:24-1494; Exs. 131-42. He also completed a review of the pertinent medical record, both of which were included in his final report. Ex. 144. This investigation confirmed the facts as originally reported. Ex. 144.

Following the second investigation, Western State decided, considering the egregious conduct and requirement to follow progressive discipline, that Boyd should be suspended for two weeks without pay. RP 1739:16-1741:12; Ex. 151. Maddox played no role in the second

⁴ The State Patrol's investigation did not reveal any facts upon which Western State could conclude that Maddox sexually harassed Boyd. However, Maddox admitted that she used the word "penis" when describing there were certain projects that were typically done by men. For this inappropriate language, Maddox received a letter of reprimand. RP 1735:2-1736:22.

investigation or in the decision-making process that occurred following the second investigation.

C. Witnesses Confirmed Boyd Made Threatening Comments

On the morning of the MRT meeting in which the team decided to conduct an investigation into Boyd's patient care neglect, Cook-Gomez saw Boyd outside the meeting room window. RP 6/19/13 33:2-34:6. On the next shift, Cook-Gomez overheard Boyd saying "the best way to shoot somebody without getting caught" is to use an "AK-47 and a silencer." Boyd then gave a detailed description of where he would stand if he wanted to shoot someone at the Hospital. He described the building in which he and Cook-Gomez worked, the way he would crouch in bushes next to the parking lot, and his vantage point into the parking lot where Cook-Gomez parked. RP 6/19/13 28:18-29:23, 152:11-17; Ex. 95. Although Boyd was not speaking to her, Cook-Gomez testified that she felt threatened by the detail of his remarks. Ex. 95.

In one of the meetings to discuss the patient care investigation with Southwick and Armstrong, the investigator from the Incident Management Office, Cook-Gomez mentioned Boyd's comments. RP 1358:21-1359:8. In addition, LPN Irma Ward had previously told Cook-Gomez that around the same time, Boyd said to her: "A little birdy told me that the hospital is coming after me – well they may fire me but they will sure as hell

remember me.” Ex. 94; RP 387:17-25, 465-66. There was also another report that Boyd said to a coworker he would be getting even with the night shift. Ex. 119. Armstrong advised that an additional investigation into these statements was required. RP 1358:16-1360:1; Ex. 83.

Because Cook-Gomez was already investigating the December 26, 2009, misconduct, Southwick assigned the other HMH RN3, Patricia Maddox, to investigate these allegations. This decision to have Maddox investigate occurred prior to Boyd’s sexual harassment allegation. RP 335, 1360-1361.⁵ Like Cook-Gomez, Maddox met with each witness, typed up their answers to specific questions, and then later allowed them to make any edits before signing the statement. RP 414-15, 422. Maddox interviewed several individuals, including Cook-Gomez and Boyd, and their HMH ward coworkers John Simpson, Andy McCants, Manuel Guingab, Kennard Ray, and Irma Ward. RP 416-17, 420-421; Ex. 119.

Paula Cook-Gomez confirmed what she initially reported. RP 392:6-393:8; Ex. 95. When interviewed by Maddox, Irma Ward

⁵ On January 21, 2010, due to the nature of the allegations, and because Cook-Gomez was not comfortable supervising Boyd, Southwick and her superior, Psychiatric Nurse Executive, JoAnne Blacksmith, reassigned Boyd to a separate unit until the investigations into his patient misconduct and threatening remarks could be brought to a close. RP 1359-60. On January 27, 2010, the day Boyd was interviewed regarding his actions on December 26, 2009, Boyd caught his foot in a door, fell, and hurt his back. He was gone on the resulting L&I claim from February 19 until September 1, 2010. He returned to work, but then left again on an L&I claim on October 15, 2010. Upon returning to work, he was placed in Nursing Administration due to a 40-lb lifting restriction. A reasonable accommodation process started at that time, which was followed through until August 2012. CP at 49-51.

informed Maddox that the statement she heard was not threatening in nature, and instead Boyd was talking about his homemade apple cider. RP 416-17. While Maddox did not include this explanation in her report, she informed HR and Boyd's chain of command of Ward's updated interpretation of Boyd's comments.

John Simpson reported to Maddox that Boyd also said "at least 3 times" that he could "get rid of a women's body by burning it beyond recognition by putting it in a car's trunk with a spare tire and setting it on fire. The tires and the gas in the gas tank would burn it up so completely that even the bones would burn and it would be impossible to identify." Exs. 98, 101. Simpson also stated Boyd pulled a large kitchen knife out of his locker and asked Simpson to imagine the kind of damage it could do to someone. Exs. 98, 101. At trial, Simpson verified he heard Boyd make each of these statements in the presence of Cook-Gomez. RP 517-18, 524-25. Simpson also testified the questions asked by Maddox did not suggest any certain answer and Maddox prepared an accurate typed-version of his statements, which he signed. RP 519-20.

Still before any allegation of sexual harassment, Maddox met with Boyd regarding the remaining allegations. Boyd denied making any of the statements alleged by Cook-Gomez and Simpson, with the exception of explaining that the knife was used for cooking. RP 421-423; Ex. 102.

Boyd refused to sign a statement reflecting his position, however. RP 422-23.

Maddox completed her report on December 2, 2010. Ex. 119. Maddox summarized the results of these interviews in her final report and attached the signed witness statements as exhibits. RP 420-21; Exs. 95, 98, 101, 102, 119. Maddox also included copies of the relevant Western State policies, including Policy 3.4.10 regarding Workplace Violence Policy and Policy 1.7.12 regarding Western State's Code of Ethical Conduct. Despite including these policies, Maddox made no findings as to whether the allegations giving rise to the investigation were founded or unfounded or whether, if true, those actions violated Western State employment policies. RP 424; Ex. 119.

Maddox delivered the report to Southwick, RN4, and Human Resources. RP 424. Maddox had nothing to do with any subsequent decisions as to discipline after submission of her report and she had no knowledge of what discipline, if any, Boyd received as a result. RP 424:8-425:6.

Based on the witness statements, Western State decided to issue to Boyd a letter of reprimand for making inappropriate threatening comments in violation of the workplace violence policy. Ex. 154; RP 1737:19-1738:17. Western State did not find that Boyd made actual threats;

however, Boyd's statements violated policy even though they were not direct threats because stating an opinion the best way to kill somebody or get rid of a woman's body, etc., by itself, warrants a letter of reprimand. RP 680:6-14, 681:6.

D. Procedural History And Rulings Affecting The Outcome of The Case

Boyd sued Western State claiming Maddox sexually harassed him, and asserted the Hospital's discipline was retaliation against him for his sexual harassment claim. Western State moved for summary judgment on both claims. The trial court granted summary judgment, dismissing the sexual harassment claim because Maddox was not the "alter ego" of Western State and because Western State had no notice of Maddox's conduct until long after it had ended.

The trial court, however, denied summary judgment regarding retaliation. According to the trial court, Maddox's role in the investigation may have impacted the decision of other higher level managers to impose discipline.

Trial commenced on June 10, 2013. The trial court ruled that there was an issue of fact that Maddox's role in the investigation may have been retaliatory. As such, the trial court allowed all employment actions that happened after the alleged harassment in April 2009 to proceed to the jury. The jury found for Boyd and awarded \$173,000 in damages. Liability was

ostensibly premised on a variety of employment decisions erroneously allowed to go to the jury as being potentially adverse employment actions, in spite of the lack of evidence of retaliatory animus. In addition, because not all decisions rose to the level of adverse employment actions, and because the trial court did not give Western State's proposed special verdict form, it is impossible at this stage to determine whether the jury's decision was based on an adverse employment action or a permissible business decision.

IV. SUMMARY OF ARGUMENT

The sole cause of action tried to the jury was a claim for retaliation. Boyd claimed he rejected Maddox's alleged advances, and this resulted in the discipline and other actions, rather than Boyd's conduct on December 26, 2009. Boyd alleged that essentially every employment decision amounted to an adverse employment action upon which liability could be based: the Hospital's investigations into patient misconduct and threatening comments; Boyd's receipt of a written reprimand; Boyd's two-week suspension; Boyd's transfer from Ward C-4 to other wards. At trial Boyd added referrals to law enforcement regarding the potential threatening comments, and to the Department of Health regarding patient neglect, as adverse employment actions.

First, the trial court erred by allowing all of these actions to go to the jury as potential adverse employment actions. While the suspension without pay was an adverse employment action, the other events, such as the investigations into allegations of misconduct and subsequent transfers, written reprimand, and the like, were not adverse employment actions under the case law defining such actions. *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007, 114 P.3d 1198 (2005). The trial court's failure to properly limit the alleged adverse employment actions resulted in a jury verdict that was potentially based on legitimate, non-actionable employment actions. This matter should be remanded for a new trial on this basis alone.

Second, Boyd failed to show *any* causal link between allegedly rejecting Patricia Maddox's sexual advances and raising sexual harassment allegations (the protected activity) and the alleged adverse employment actions. Western State's decision to investigate Boyd's patient care misconduct and the threatening comments, to transfer Boyd to various other wards, to notify the Department of Health regarding the nurse practicing misconduct and local law enforcement based on the threatening comments, and the decision to discipline Boyd for patient neglect misconduct, were all made by decision makers prior to any knowledge of Boyd's protected activity. Only the decision to suspend

Boyd without pay for two weeks and the decision to issue a written reprimand for the various threatening comments came after Boyd alleged sexual harassment. However, even those decisions were based on facts collected prior to any knowledge of Boyd's allegations and, even more importantly, they were justified based on undisputed facts. As a result, there cannot be retaliation and this matter should be dismissed in its entirety.

Third, the trial court accepted Boyd's so-called "cat's paw" theory of liability, which applies where an employer with no known discriminatory intent takes adverse employment actions after a subordinate supervisor with discriminatory/retaliatory animus, provides fabricated evidence or a biased recommendation to the decision-maker. The trial court erred in giving the cat's paw instruction. First, there was simply no evidence that Maddox provided fabricated information or otherwise tainted the investigatory process. Here, Maddox simply reported to management, as was required of her, factual statements made by others, which were then verified either by separate investigations (patient care misconduct) or by testimony at trial (threatening comments). The decision to discipline came after separate investigations and after Boyd was given an opportunity to explain. Second, the instruction itself amounted to a directed verdict because it eliminated the need for Boyd to prove

retaliatory animus was a substantial factor in the decision to discipline. For these reasons, the trial court committed reversible error and based on this ground, the case should be remanded for a new trial.

Fourth, the trial court erred in failing to adopt Western State's proposed special verdict form, which set forth all of the potential adverse employment actions that would have allowed the court at a later time to determine whether liability was premised on a cognizable employment action, as opposed to a legitimate decision. CP at 1979-85.

The investigations into Boyd's misconduct were properly initiated, properly executed by the members of Boyd's chain of command and, ultimately, concluded Boyd should be subjected to discipline. For these reasons, this case should not have made it to the jury and should have been dismissed. In the alternative, this matter should be remanded for a new trial consistent with the arguments set forth herein.

V. ARGUMENT

A. The Trial Court Erred In Failing To Limit Boyd's Liability Theory to Adverse Employment Actions That Afford A Cognizable Basis For Recovery

Boyd claimed a variety of employment decisions were adverse employment actions. However, not all employment decisions arise to the level of adverse employment actions. By failing to grant Western State's CR 50 motion for judgment as a matter of law on this point, and then

failing to give Western State's proposed special verdict form or otherwise properly instruct the jury, it is impossible to discern whether the jury's decision was based on a legitimate, non-actionable employment action.

In order to prove retaliation, an employee must demonstrate:

(1) [H]e or she engaged in a statutorily protected activity;
(2) an adverse employment action was taken; and (3) there was a causal link between the employee's activity and the employer's adverse action.

Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 797, 120 P.3d 579 (2005). Specifically, Boyd claimed as adverse employment actions that he was the subject of two investigations; he was reassigned to a different ward and taken away from patient care; the Department of Health was contacted regarding the breach of nursing care; law enforcement was contacted regarding the alleged threatening statements; he received a written letter of reprimand; and he was suspended without pay for two weeks. *See* CP at 1794, 2139. However, only the suspension without pay is a recognized adverse employment action and accordingly it was error to allow all of these employment decisions to go to the jury as potential adverse employment actions upon which liability could be based. A new trial should be granted on this basis alone.

Pursuant to CR 50, after "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a

reasonable jury to find” for a party with respect to that issue, the trial court may grant a motion for judgment as a matter of law. CR 50.

The standard of review of a “motion for judgment as a matter of law mirrors that of a summary judgment.” *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). That is, the appellate court reviews the trial court’s ruling de novo. *Id.* The trial court erred in denying Western State’s CR 50 motion to limit those employment actions that could be presented to the jury as an adverse employment action. CP at 1787, 1794-1800. The trial court further erred in rejecting Western State’s proposed special verdict form. CP at 1979-85. In the alternative, during discussions regarding the instructions, the trial court rejected any proposed instruction regarding the definition of adverse employment action which contained “a list” of those things upon which the jury would be allowed to find liability. RP 1855-56.

Instead, the trial court gave Jury Instruction No. 9:

An adverse employment action is defined as an employment action or decision that constitutes an adverse change in the circumstances of employment. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making complaints of sexual harassment or retaliation. An adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities.

CP at 2160.

This instruction, when combined with the lack of a special verdict form and the court's denial of the CR 50 motion, is contrary to law. It is settled law that "[n]ot every employment decision amounts to an adverse employment action." *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996). In *Kirby v. City of Tacoma*, the Court of Appeals limited the types of actions that can qualify as an adverse employment action.

In *Kirby*, the plaintiff brought an age discrimination/retaliation claim against his employer, the City of Tacoma, because the Tacoma Police Department failed to promote him. Kirby had a contentious relationship with upper management prior to the promotion opportunity. In addition, Kirby had been the subject of numerous disciplinary investigations, some of which lasted a few months and some of which lasted up to two years. Kirby alleged that all of these were adverse employment actions.

The *Kirby* Court disagreed. It held an "adverse employment action" requires "an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action." *Kirby*, 124 Wn. App. at 465 (citing *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74 n.24, 59 P.3d 611 (2002) (Bridge, J. *dissenting in part*)). *Kirby* also looked to federal law,

recognizing that an actionable adverse employment action must involve a change in employment conditions that is more than an “inconvenience or alteration of job responsibilities, such as reducing an employee’s workload and pay. In contrast, yelling at an employee or threatening to fire an employee is not an adverse employment action.” *Kirby*, 124 Wn. App. at 465 (citations omitted).

The *Kirby* court ruled that the Tacoma Police Department’s failure to promote Kirby was an adverse employment action (which the City conceded), but ruled that other events, such as the investigations into allegations of misconduct, and oral reprimand, were not adverse employment actions. The court ruled that those actions were only “disciplinary or investigatory in nature, or events that were “inconveniences that did not have a tangible impact” on Kirby’s workload or pay. *Kirby*, 124 Wn. App. at 465. Here, only the suspension without pay can be construed as an adverse employment action. All other decisions – to investigate the two instances of misconduct, to transfer, to alert other authorities – are not adverse employment actions. The written reprimand, without more, is purely “disciplinary in nature,” and cannot constitute an actionable adverse employment action. Here, the written reprimand did not affect Boyd’s workload, his pay, his job assignment, it did not alter his

responsibilities, nor did it rise beyond the level of being “disciplinary or investigatory in nature.” *Kirby*, 124 Wn. App. at 465.

The trial court erred in allowing *all* of the various forms of employment action to go the jury as potentially adverse employment actions. Because the trial court denied Western State’s CR 50 motion, Western State was required to elicit testimony from key witnesses, as well as to call additional witnesses to address employment decisions that were not cognizable. In addition, Boyd’s counsel was able to focus much of the jury’s attention, in both testimony and closing, on employment actions that were perfectly legitimate business decisions. This resulted in prejudice to Western State because it had to defend against numerous actions upon which liability could be premised.

Ultimately, however, at this juncture, it is impossible to discern whether the jury’s decision was based on legitimate business decisions, such as the decision to conduct an investigation into allegations of misconduct. Based on this ground alone, this Court should reverse the jury’s verdict and remand the matter back to the trial court with directions to limit to the adverse employment action to Boyd’s suspension without pay.

B. Boyd's Retaliation Claim Should Have Been Dismissed Pursuant To Western State's CR 50 Motion Based Upon The Absence Of Any Evidence Establishing A Casual Link Between An Adverse Employment Action And A Retaliatory Animus

The trial court erred in failing to dismiss this case in its entirety on summary judgment, and again as a matter of law under CR 50, because there was no evidence to support the causal connection between any employment decision and the alleged harassment.

To meet the third element of retaliation, a causal connection, Boyd must show that the protected activity – rejecting Maddox and alleging he was sexually harassed – was a “substantial factor” in motivating adverse employment action. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 69-70, 821 P.2d 18 (1991). Accordingly, Boyd was required to provide evidence that the decision makers (those individuals responsible for directing the so-called adverse employment action) were at the very least actually aware that the employee engaged in protected activity. *See Graves v. Dep't of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (citing, *Wilmot v. Kaiser Aluminum & Chem, Corp.*, 118 Wn.2d 46 (1991), quoted with approval in *Allison v. Housing Auth. of City of Seattle*, 59 Wn. App. 624 (1990) (causation is met by establishing that the employee participated in an oppositional activity, the employer knew of the opposition activity, and the employee was discharged.”)).

Boyd's case is fundamentally flawed because there is no evidence that any of the decision makers at Western State were aware of Boyd's allegation that he rebuffed Maddox's overtures prior to almost every employment decision at issue. And where an employment decision came after Boyd alleged sexual harassment, there is no evidence that the resulting decisions were retaliatory, rather than legitimate business decisions based on Boyd's conduct.

1. There Is No Causal Connection Where The Alleged Adverse Employment Action Occurred Before Boyd Alleged He Was Sexually Harassed

The trial court erred in denying the CR 50 motion. There was no evidence that the allegedly adverse employment actions were retaliatory because there was no evidence the decision makers were even aware of Boyd's allegations and/or no evidence that Maddox was involved in making any of those decisions.

Boyd did not allege sexual harassment until December 1, 2010, well after most of the alleged adverse employment actions were taken:

December 26, 2009: Boyd engaged in misconduct regarding patient care.

January 14, 2010: MRT decided to investigate Boyd because if he failed to assess a patient, that would be grounds for discipline.

January 21, 2010: Psychiatric Nurse Executive Joanne Blacksmith and Southwick, RN4, decided to transfer Boyd because of the potentially threatening comments made in front of the RN3 responsible for the investigation.

February 8, 2010: Southwick assigned Maddox to conduct an investigation into allegations of threatening comments in the workplace.

March 2010: Western State, per the Psychiatric Nurse Executive, referred the allegations regarding Boyd's patient neglect to the Department of Health; Western State referred the threatening comments to the Lakewood Police Department.

October 14, 2010: Western State's CEO signed the Notice of Intent to Discipline based on the finding that Boyd neglected Patient J and violated nursing protocol.

All the above decisions were put before the jury as potential adverse employment actions upon which liability could be based. However, there is no evidence that any of those employment decisions – even assuming they could be called “adverse employment actions” – were made with retaliatory animus because there was no evidence that anybody who made those decisions was even aware of Boyd's allegations. For this reason, Boyd fails to meet the third element of a prima facie case for essentially all of the allegedly adverse employment actions. The judgment

should be reversed and the case remanded with direction to dismiss these claims.

2. The Decisions To Suspend Boyd Without Pay And To Issue A Written Reprimand Were Based On Legitimate Business Reasons And There Is No Evidence That Retaliation Was A Substantial Motivating Factor

The only two employment decisions that came after Boyd alleged sexual harassment were the suspension without pay and the letter of reprimand for threatening comments. However, both of these decisions were based on facts and witness statements regarding Boyd's misconduct. There is no evidence that these facts or witness statements were influenced by Patricia Maddox and there is no evidence that anyone other than Patricia Maddox might have harbored retaliatory animus against Boyd. It is undisputed that Boyd's misconduct constituted serious violations of agency policy and nursing protocol.

a. The Investigation Into Patient Neglect And The Decision To Discipline Were Based On Undisputed Facts And Legitimate Reasons

The two-week suspension without pay for patient neglect was supported by sufficient and undisputed evidence that was completely independent from Maddox. As shown above, the decision to investigate was made prior to allegations of Maddox's alleged harassment. However, even assuming that investigation could be wrapped into the decision to

suspend Boyd, he did not prove that the action was taken because of retaliatory reasons. The undisputed evidence is that Western State was obligated to investigate the allegations that Boyd engaged in patient neglect, and then Western State determined, as the result of two separate investigations, that a suspension was warranted.

The initial investigation by Cook-Gomez confirmed the reports that Boyd failed to assess Patient J. Both Psychiatric Nurse Executive Blacksmith and RN4 Southwick believed dismissal was an option because Boyd's conduct was egregious. The MRT, in conjunction with an assistant attorney general, and the CEO, Jess Jamison, decided *that discipline was appropriate*.

When HR sent Boyd a Notice of Intent to Discipline, there is no evidence that the decision makers at Western State had any knowledge whatsoever about Boyd's allegations. *See* Ex. 116. Nor is there any evidence that Maddox played any role in the decision to discipline Boyd. There is no question that the factual findings, if true, would support a decision to discipline. Even Boyd agrees that the facts set forth in Notice of Intent warranted disciplinary action, up to and including dismissal.

When Boyd alleged Patricia Maddox had sexually harassed him and retaliated against him, on December 1, 2010, Western State instructed that the allegations be re-investigated by Western State's Incident

Management Office. Investigator David Rivera was assigned. He interviewed the witnesses present on December 26, 2009, again, and the staff members reported the same facts.

The evidence supported the MRT's decision to take disciplinary action. The results of the second investigation confirmed the results of the first investigation, which confirmed the reports originally made to Maddox. The reason Boyd was suspended without pay was because he violated patient care policy and there is no evidence to the contrary. Accordingly, the only arguable adverse employment action in this case was based on a legitimate business reason and there is no evidence the true decision makers acted in retaliation. Given that the two-week suspension was supported by an independent investigation, the trial court should have held, as a matter of law, that it could not have been retaliatory.

b. The Investigation And Letter Of Reprimand Based On Threatening Comments Were Supported By Facts Independent Of Any Provided By Maddox

Western State issued Boyd a letter of reprimand based on the witness statements that showed Boyd made inappropriate, threatening comments in the work place. Boyd also claimed the investigation into his threatening comments and the resulting letter of reprimand were retaliatory. This is incorrect.

The testimony is undisputed that the decision to investigate Boyd for making threatening comments was made by RN4 Southwick at the direction of Georgia Armstrong, investigator. The decision to investigate was made after Cook-Gomez told Southwick and Armstrong that she had overheard Boyd say “the best way to shoot somebody without getting caught” is to use an “AK-47 and a silencer” while describing in detail where he would stand and how he would crouch in bushes next to the parking lot with a vantage point to where Cook-Gomez parked. Because Cook-Gomez had just been assigned to investigate Boyd’s patient neglect misconduct, she felt threatened by Boyd’s comments.

On February 8, 2010, Southwick assigned Maddox to interview potential witnesses, gather signed witness statements, and complete a report. In addition to Cook-Gomez’s statement, Maddox obtained a statement from John Simpson who reported to Maddox that Boyd also said “at least 3 times” that he could “get rid of a women’s body by burning it beyond recognition by putting it in a car’s trunk with a spare tire and setting it on fire. The tires and the gas in the gas tank would burn it up so completely that even the bones would burn and it would be impossible to identify.” Exs. 98, 101. Simpson also stated Boyd pulled a large kitchen knife out of his locker and asked Simpson to imagine the kind of damage it could do to someone. In his interview with Maddox, Boyd denied

making essentially all of the statements. At trial, Boyd testified that Maddox did not accurately record his answers, which is why he did not sign the document. RP 1082:11-20. However, there was no explanation given at the time akin to the explanation he gave at trial, so Western State was left with the signed statements from other witnesses and Boyd's blanket denial.⁶

On December 2, 2010, Maddox completed and provided to her chain of command her report, which included the signed witness statements as exhibits. The statements of Cook-Gomez and Simpson were verified at trial. Maddox had no role after that and no role in any disciplinary decisions.

The letter of reprimand was based on the fact that Boyd's comments violated policy. As HR Manager Lori Manning explained, the letter of reprimand was not for specifically threatening somebody, but for using language that was unprofessional and threatening in the workplace. Manning's testimony was undisputed that (1) taking a knife out of a locker and suggesting it could do a lot of damage to a person violates Western State's policy regardless if the person hearing that statement feels threatened or not (RP 680:6-14); (2) stating that the best way to get rid of a woman's body is by burning it in the trunk of a car violates policy, even

⁶ At trial, Boyd explained that he was talking about an episode of a show called *Manservants* on Spike TV and that Maddox made up his denial. RP 1082.

if the statement is not perceived as threatening; (3) the statement that the best way to kill somebody is with a long range assault rifle, while describing an area on the hospital grounds could also be grounds for a letter of reprimand. RP 680:15-24-681:6.⁷

Boyd failed to prove that any of the decision makers had any retaliatory animus, rather than a legitimate reason to sanction Boyd for inappropriate comments, when they decided to issue a letter of reprimand. Moreover, Boyd presented no evidence that Patricia Maddox or anyone else fabricated or exaggerated any of the facts in the course of the investigation. At trial, the witnesses corroborated their prior investigatory statements. Cook-Gomez: RP 1171:18-1172:23, 1295:11-17; Simpson: RP 517-18, RP 519-20, 524-25. Quite simply, there is no evidence that Maddox had any impact whatsoever on the decision to reprimand Boyd. Because the facts supporting the letter of reprimand were all independently confirmed by witnesses other than Maddox, the trial court should have held, as a matter of law, that the reprimand was not retaliatory.

⁷ It is worth noting that Cook-Gomez did actually feel threatened by these remarks.

C. The Trial Court Erred In Applying The “Cat’s Paw” Theory Of Liability And Giving Jury Instruction No. 11

Because there was no evidence tying any of the alleged adverse employment decisions to a supervisor with retaliatory animus, Boyd relied on the so-called “cat’s paw” theory of liability. Cat’s paw discrimination/retaliation occurs when a subordinate supervisor “by concealing relevant information from the decision-making employee or feeding false information to him, is able to influence the decision.” *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) (citing *Conn v. GATX Terminals Corp.*, 18 F.3d 417, 420 (7th Cir. 1994)).

The United States Supreme Court explained the rule as follows:

We therefore hold that if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action and if that act is a proximate cause of the ultimate employment action, then the employer is liable

Staub v. Proctor Hosp., __ U.S. __, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011) (emphasis theirs).

Accordingly, to prove cat’s paw, Boyd must prove (1) Maddox performed an act motivated with discriminatory/retaliatory animus with the intent to cause an adverse employment action, and (2) the discriminatory/retaliatory act was the proximate cause of the ultimate employment action.

Proximate cause, however, is severed where the employer conducts an independent investigation, as long as the investigation did not effectively delegate decision making power to the subordinate supervisor. The courts have not adopted a hard-and-fast rule that would always immunize an employer who performs an independent investigation. However, “if the employer’s investigation results in an adverse action for reasons unrelated to the supervisor’s original biased action, then the employer will not be liable.” *Staub*, 131 S. Ct. at 1193. That is, when an independent investigation determines adverse action is justified, “apart from the supervisor’s recommendation,” cat’s paw will not apply. *Id.*; see also *Poland v. Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007) (if an adverse employment action is the consequence of an entirely independent investigation, the animus of the retaliatory supervisor is not imputed to the employer); *Willis v. Marion Cnty Auditor’s Office*, 118 F.3d 542, 547 (7th Cir. 1997) (if the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant).

In *Willis*, the plaintiff was terminated after receiving a third reprimand in a one-year period for repeatedly violating Marion County’s requirement to process invoices within three days. There, cat’s paw did not apply because the decision maker reviewed the plaintiff’s files and the invoices contained in those files. The decision maker also met with the

plaintiff and discussed the alleged discrimination before determining the violations had occurred. *Willis*, 118 F.3d at 547-48. *See also Lobato v. New Mexico Env't Dep't*, 733 F.3d 1283, 1295 (10th Cir. 2013) (an employer is not liable under a subordinate bias theory – even if the biased subordinate first alerted the employer to the plaintiff's misconduct – where the employer did its own review of records available in the employer's data system); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 725 (8th Cir. 1998) (concluding that the school board's investigation, consisting of hearing testimony from the plaintiff and fifteen other witnesses, reviewing various documents, and watching a videotape, was sufficient for the investigation to be deemed independent); *Rajaravivarma v. Connecticut State Univ. Sys.*, 862 F. Supp. 2d 127, 159 (2012) (cat's paw does not apply where the plaintiff was denied tenure after the university president reviewed all recommendations and evaluations, not just the biased supervisor's, and did not “blindly accept” the conclusions or recommendations of any one professor).⁸

⁸ Conversely, where there is evidence that the employer's subsequent investigation failed to separate the biased supervisor's fabrication or animus, resulting in a biased determination and adverse employment action, cat's paw will apply. *See, e.g., Staub*, 131 S. Ct. 1186 (biased supervisor set up adverse employment action by fabricating plaintiff's violation of company policy – fabricating both the existence of the policy and the factual violation of the policy – then reporting the fabrication to the decision maker, who in turn failed to investigate plaintiff's complaints of discrimination before terminating); *Poland*, 494 F.3d 1174, 1183 (investigatory panel influenced by supervisor's lengthy memo requesting inquiry into plaintiff's performance, conducted 21 witness interviews of those preselected by the biased supervisor, and reviewed numerous

In addition, cat's paw will not apply if the "non-decision maker's animus did not infect the decision making process" because "the plaintiff was able to appear before the decision-maker and present his side of the story." *Willis*, 118 F.3d 542, 547 (quoting *Conn v. GATX Terminals Corp.*, 18 F.3d at 420 (7th Cir. 1994) (decision maker met with plaintiff and was aware of allegations that phony invoices were planted by a racist supervisor and investigated those claims before deciding to terminate the plaintiff)); *English v. Colorado Dep't of Corr.*, 248 F.3d 1002 (10th Cir. 2001) (cat's paw liability precluded, even assuming the investigators themselves were biased, because the decision maker met with the plaintiff and plaintiff's attorney on two occasions to discuss the investigators' findings); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220 (10th Cir. 2000) (cat's paw doctrine did not apply where supervisor offered plaintiff an opportunity to tell his side of the story, but plaintiff refused); *Willis*, 11 F.3d at 547-58 (refusing to apply doctrine where decision maker offered plaintiff an opportunity to prove her assertion that she was the victim of a racially-motivated campaign).

critical notes of plaintiff made by biased supervisor); *Bergene v. Salt River Project Agric. Improv. & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (retaliatory supervisor advised management to remove a specific qualification as a prerequisite to a position which disadvantaged plaintiff and provided management with an assessment of the plaintiff's ability).

Here, instructing the jury on the “cat’s paw” theory of liability was in error for two reasons. First, the theory of “cat’s paw” liability is inapplicable where the subordinate supervisor merely reported factual allegations made by others to supervisors and was not involved in the decision making process, where the supervisors then verified the factual allegations by conducting a separate investigation, and where the employee/plaintiff was given the opportunity to appear and allege that discrimination/retaliation played a role. Second, the instruction, as given, negated the central element of proving retaliation – that retaliatory animus was a “substantial factor” in any adverse employment action – and essentially directed the verdict.

1. Cat’s Paw Does Not Apply Where The Allegations Of Misconduct Were Required To Be Reported And Were Verified By Independent Investigations

Several of Boyd’s alleged adverse employment actions rely on the cat’s paw theory because they clearly occurred before other Western State officials were aware of his allegations of sexual harassment. *See, supra*, pp. 27-28. However, cat’s paw simply does not apply because Maddox only accurately reported allegations made by others to her chain of command, as required by her supervisors.⁹

⁹ Maddox had nothing to do with reporting the threatening comments to law enforcement; that was all done by Paula Cook-Gomez, and therefore cat’s paw cannot apply to that action.

First, it is undisputed that Maddox's supervisors expected that Maddox report the allegations of patient neglect to her chain of command, which she did. RP 654:2-10, 1352:19-1353:9, 1542:14-1543:14. Without question, Maddox was fulfilling the expectations of her job. It is also undisputed that Maddox's supervisor Southwick, RN4, directed Maddox to gather witness statements regarding the patient neglect to present to the MRT. RP 436:3-5, 1354:19-1355:20. Maddox did not act with retaliatory animus, but rather fulfilled the expectations of her supervisors. Cat's paw should not apply where the supervisor was required to report the allegations upon which disciplinary action was taken.

Second, Maddox never "reported" biased facts within the meaning of cat's paw, but rather accurately reported information to her chain of command. Undoubtedly Boyd will claim that Maddox had a retaliatory motive because he allegedly rejected her alleged sexual advances, and that suffices to establish cat's paw liability. This is incorrect, however, because Boyd cannot show that Maddox provided biased, exaggerated, or false facts that Western State relied upon, a necessary element of cat's paw. *See Staub*, 131 S. Ct. at 1193.

To warrant a "cat's paw" instruction, it is not enough for a supervisor to simply relay factual allegations reported to them, or to deliver to the decision makers a stack of e-mails or witness statements

made by others. The alleged discriminatory/retaliatory supervisor must provide the decision maker with biased or fabricated “facts,” or false or exaggerated information, with the intent that adverse action will follow.

Here, rather than “providing” false or exaggerated information to her chain of command, it is undisputed that Maddox accurately reported the allegations made by coworkers about Boyd’s December 26, 2009, misconduct. There is no evidence that any of those reports was inaccurate or fabricated. No staff member took the stand to testify that his or her statement was inaccurate or fabricated. In fact, while not all staff members testified, those who did testify clearly stood by their witness statements and testified to identical facts at trial. There is no evidence that Maddox fabricated evidence or provided inaccurate reports.¹⁰

Accordingly, the decisions to investigate Boyd, the decision to transfer Boyd, and the decision to contact the Department of Health – the decisions arguably based on Maddox’s reports – and the decision to discipline Boyd are not susceptible to cat’s paw liability. There is no acceptable way to establish liability for those decisions. Thus, the trial court improperly allowed a cat’s paw instruction.

¹⁰ While Boyd may point to conflicting witness statements regarding the events of December 26, 2009 (and the threatening comments for that matter), any conflict in testimony is irrelevant. The point is that even if only some witnesses allege misconduct, those allegations have to be explored and investigated.

2. Independent Investigations Made A Cat's Paw Instruction Improper

The alleged adverse employment actions that occurred after the report of sexual harassment – the decisions to suspend Boyd without pay for patient neglect and to issue a written letter of reprimand – were based on independent investigations, which sever cat's paw causation.

a. CR 50 Dismissal Should Have Been Granted Because The Decision To Suspend Without Pay Was Based On Two Investigations Into Boyd's Patient Neglect

In regards to the patient misconduct, Maddox's role was limited to (1) reporting to her supervisor what her staff reported to her on December 26, 2009: that Boyd failed to respond to two requests to assess a patient, impersonated a fellow staff member when the second request came in, failed to respond until directed by his supervisor, and then lied about his delay claiming that he was in the bathroom, and (2) gathering witness statements to present to MRT, under Southwick's, RN4, direction.

The statements reported to Maddox and then conveyed up the chain of command were confirmed and verified by two separate investigations. The first investigation was conducted by Paula Cook-Gomez. Her report to the MRT provided a summary of statements and signed witness statements that confirmed the allegations regarding Boyd's conduct on December 26, 2009. Ex. 108. The second investigation was

initiated after Boyd claimed that the original investigation was biased. RP 1734:7-14. That investigation, conducted by an investigator from the Incident Management Office, confirmed the allegations as originally reported to Maddox and then conveyed to her superiors. Ex. 144.

Accordingly, the two-week suspension without pay – arguably the only adverse employment action under *Kirby* – occurred only after two separate investigations that confirmed Boyd had engaged in misconduct. Both investigations were completed by two individuals who were never alleged to be biased. No witness in either of the two separate investigations contradicted their original statement made to Maddox.

It is undisputed that the facts, as confirmed by two separate investigations, warrant disciplinary action. Even Boyd agrees. Therefore, there was a legally permissible basis upon which a suspension without pay was based, apart from Maddox's original report.

If Cat's paw were to apply where a subordinate supervisor accurately reported allegations of misconduct merely because the supervisor had an improper motive, it would preclude the employer from taking action warranted under the facts, and it would shield an employee who engaged in misconduct from accountability. Cat's paw should not apply to this case.

b. The Letter Of Reprimand Was Also Based On Independent Unfabricated Facts

Similarly, the decision to give Boyd a written letter of reprimand was made after an investigation.¹¹ Although Maddox conducted the investigation, Maddox's role was still only to report what was reported to her by the staff members she interviewed. These staff members confirmed their version of events in testimony at trial.

The decision to investigate Boyd's threatening comments occurred after Cook-Gomez reported them. Cook-Gomez reported to her chain of command prior to and completely separate from Maddox's involvement.

Maddox was directed by her supervisor to conduct the investigation. RP 1360:15-16. Maddox conducted interviews, gathered signed witness statements, summarized those statements in a report, and provided all of this to her chain of command. Ex. 119. Maddox's summary and the signed witness statements confirmed what Cook-Gomez had already reported. They also accurately reported the statements Boyd made in the presence of John Simpson about the best way to dispose of a woman's body by burning it in the trunk of a car.

Boyd will likely argue that Maddox's role in this investigation tainted the outcome. For instance, at trial, Boyd's counsel focused

¹¹ It should be noted that the letter of reprimand was not an adverse employment action.

attention on the fact that Irma Ward recanted her statement that Boyd had said words to the effect that if Western State fired him, they sure “will remember” him, and his statement was threatening. This statement was one of the reasons an investigation was initiated, but Maddox did not include Ward’s recantation in her final report. It is misleading to suggest this tainted the process because, after Maddox learned that Ward denied the statement was threatening, Maddox contacted Western State’s Human Resource Department to discuss how to report Ward’s updated version of events. RP 418-20; Ex. 21. Maddox did not include Ward’s recanting in her final report, but she did so with the understanding, after speaking with Manning, that everyone in Boyd’s immediate chain of command was well aware Ward believed Boyd’s statements pertained to apple cider – not threats of workplace violence. RP 419-20.

The central flaw with this, or any argument Boyd may come up with, is that there is no evidence that the investigation was actually tainted.

At trial, both Cook-Gomez and Simpson verified their statements. Simpson also testified the questions Maddox asked did not suggest any certain answer and Maddox prepared an accurate typed-version of his statements, which he signed. There was simply no testimony from any one that Maddox influenced their witness statement, misrepresented their answers, or otherwise concocted evidence regarding Boyd’s statements.

Maddox's role was limited to accurately reporting the statements as reported by others.

HR Manager Lori Manning testified that Boyd's statements violated policy and would serve as grounds for a letter of reprimand. This testimony was not disputed. Cat's paw does not apply where there is a legally permissible basis for the employment decision. *Willis*, 118 F.3d at 547. Here, there is a legally permissible basis for a letter of reprimand as was confirmed by John Simpson and Paula Cook-Gomez with their testimony at trial. It is undisputed that the decision to provide Boyd with a Letter of Reprimand for those statements was made by Human Resources along with the Psychiatric Nurse Executive. Maddox played no role in that decision.

Cat's paw liability does not apply where the underlying misconduct actually occurred and would support the decision to discipline. *Staub*, 131 S. Ct. at 1193; *Willis*, 118 F.3d at 547-48. The cases that have adopted the theory of cat's paw liability have done so where the retaliatory supervisor more or less planted what amounted to false allegations or evidence in hopes that upper management would rely on the falsehood and take the retaliatory action. *Staub*, 131 S. Ct. at 1186. The cornerstone of cat's paw liability – that a biased supervisor provides fabricated information to or conceals facts from the decision maker – is not present

here. This matter should be dismissed because there is no cognizable theory upon which liability can be based.

3. The “Cat’s Paw” Jury Instruction Was Inconsistent With The Jury Instruction On Retaliation

In addition, the trial court erred in giving the cat’s paw instruction because the instruction, as given, eliminated the need to prove that retaliation was a “substantial factor” in any adverse employment action.

Jury Instruction No. 11 provided:

If a supervisor performs an act motivated by retaliatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the employer is liable for retaliation.

CP at 2162.

It is well-settled law that in order to prove a claim for retaliation, a plaintiff must prove that the retaliatory animus was a “substantial factor” in the decision to take a particular adverse employment action. *See Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995). The cat’s paw instruction, as given by the trial court, eliminated the requirement that Boyd prove that retaliatory animus was a substantial factor because it allowed the argument that the jury need only find that Maddox acted with animus in order to prevail.

Jury Instruction No. 11 allowed liability, if not directed a verdict, even if the jury concluded only that Maddox had retaliatory animus. According to Jury Instruction No. 11, an act taken by a supervisor with a retaliatory animus did not need to be improper or untrue. A jury could find that Patricia Maddox had a retaliatory animus toward Boyd, but nonetheless accurately reported all of the witness statements to her supervisors. Yet if those accurately reported witness statements were a substantial factor in bringing about Boyd's discipline, even if the discipline was legitimate, the employer would be liable for retaliation according to the instruction.

The jury instruction, as given, produced an absurd result, completely eliminating the need for the plaintiff to prove that the decision maker acted with retaliatory animus. Indeed, Boyd's counsel argued this in closing. CP at 1888.

At the end of the day, the "cat's paw" instruction, when combined with the wide-open adverse employment action instruction, allowed Boyd's counsel to argue, and the jury to conclude, that because Maddox potentially harbored retaliatory motive, Western State was liable for retaliating against Boyd based on any number of employment decisions. This was reversible error and at the very least, Western State is entitled to a new trial.

VI. CONCLUSION

Western State respectfully requests this Court reverse the denial of summary judgment, reverse the jury's verdict, and remand this case to the trial court with instructions to dismiss. In the alternative, Western State requests this Court remand the matter to the trial court for a new trial consistent with the rulings set forth in this appeal.

Respectfully submitted this 20th day of February, 2014.

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I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of February, 2014, at Tacoma, Washington.

/s/ Jennifer Singleton

JENNIFER SINGLETON, Paralegal

WASHINGTON STATE ATTORNEY GENERAL

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